JUDGE KAPLAN 13 CIV 5627

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE L. COLE, Plaintiff,	Index No.
- against -	**COMPLAINT**
VERONIS SUHLER STEVENSON, LLC, VSS FUND MANAGEMENT LLC, VERONIS SUHLER STEVENSON HOLDINGS, LLC, VSS PARTNERS LLC, VSS HOLDINGS LLC, and JEFFREY T. STEVENSON, Defendants.	**JURY TRIAL DEMANDED**

Plaintiff, George Cole ("Cole"), by his attorneys, Zukerman Gore Brandeis & Crossman, LLP, for his complaint against Versonis Suhler Stevenson, LLC; VSS Fund Management LLC; Veronis Suhler Stevenson Holdings, LLC; VSS Partners LLC; and VSS Holdings LLC (collectively, "Employer"); and Jeffrey T. Stevenson, alleges as follows:

1. Plaintiff George Cole spent twelve years working for his Employer, managing its investment funds. For all that time, he worked without having agreed to be bound by any restrictive covenant upon leaving his employment. In addition, for all that

time, Employer, acting through defendant Stevenson, promised Cole that when he eventually left, he would receive severance payments amounting to one-month's pay for each year of service. This promise was made pursuant to the terms and provisions of the company's severance policy, which was an employee benefit plan as defined under the Employee Retirement Income Security Act of 1974 as amended ("ERISA"). In the Summer of 2013, Employer, acting through Stevenson, unilaterally demanded that Cole agree to be bound by material restrictive covenants. Cole refused, and citing that refusal, Employer terminated Cole. Since then, Employer has refused to pay the agreed severance payments, the value of which totals at least $650,000.

PARTIES

2. George L. Cole is an individual who resides in Greenwich, CT.

3. Veronis Suhler Stevenson, LLC ("VSS") is a Delaware-registered limited liability company with its principal office located in New York, New York. It manages private investment funds.

4. VSS Partners LLC ("Partners") is a Delaware-registered limited liability company with its principal office located in New York, New York.

5. VSS Holdings LLC ("VSS Holdings") is a Delaware-registered limited liability company with its principal office located in New York, New York.

6. VSS Fund Management LLC ("Manager") is a Delaware-registered limited liability company with its principal office located in New York, New York.

7. Veronis Suhler Stevenson Holdings ("Holdings"), LLC is on information and belief a d/b/a or alias of VSS Holdings. Holdings is the name of the entity that issues Cole's pay stubs.

8. Jeffrey T. Stevenson is an individual who resides in New York, New York. On information and belief, Mr. Stevenson is the sole ultimate owner of each of: Holdings, VSS Holdings, Manager, Partners, and VSS.

9. Stevenson operates the defendant entities in a manner that blurs and conceals the precise legal names of these entities. Although Holdings issues plaintiff his pay stubs, Manager is believed to be plaintiffs' principal employer. The remaining entities are named because on information and belief they also employ plaintiff, or they make use of plaintiffs' services on a seconded basis. Cole's employment for each of these entities was on the same terms.

Jurisdiction And Venue

10. This Court has jurisdiction over this action because this action is brought pursuant to ERISA, 29 U.S.C. § 1132(a)(1)(b) to recover benefits under an ERISA plan. This Court maintains jurisdiction under 28 U.S.C. § 1331, as the claims for relief arise under federal common law. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over all other claims for relief related to the original claim within the exclusive jurisdiction of ERISA.

11. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because the designated situs of the plan was administered within this district.

ALLEGATIONS COMMON TO ALL CLAIMS

12. Veronis Suhler Stevenson, LLC ("VSS") is a private investment firm that manages investments in the information, education, media, marketing and business services industries in North America and Europe.

13. Since the 1980's, VSS has managed six private investment funds with capital commitments totaling over $3 billion, including four equity funds and two structured capital funds.

14. In or about November 2000, VSS hired Cole to help manage some of its funds. Cole was responsible for the origination, underwriting, structuring and management of portfolio investments in funds managed by VSS.

15. In or about 2004, VSS, through some its affiliates, created a private capital fund known as VSS Mezzanine Partners, L.P. ("Fund I"). Fund I provides non-control capital to assist with acquisition financings for specific acquisitions and to consolidate a number of industry participants; organic growth initiatives such as new product launch, geographic expansion, and capital expenditure projects; management buyouts; recapitalization; and liquidity events for owners, diversifying net worth, and facilitating estate planning. It typically invests in all segments of the media, communication, information services, and education industries in North America and Europe. The fund invests between $10 million and $75 million in companies with enterprise value between $25 million and $100 million and EBITDA greater than $5 million. It seeks to invest in a combination of securities such as subordinated notes, preferred stock, common stock, and common stock warrants.

16. Cole was named a co-manager of the general partner of Fund I.

17. Pursuant to the terms of Cole's employment, if Cole left the company, Cole had no restrictions on his ability to work, to solicit business or to solicit employees.

18. In addition, pursuant to longstanding policy at the Manager, Cole was entitled to receive severance upon leaving the Manager in monthly installment until fully paid or until the amount equaled one year's pay.

19. At all material times alleged herein, Manager maintained and continues to maintain a severance pay policy ("Severance Plan"), constituting an employee welfare plan within the meaning of ERISA, designed to provide pay and benefits to employees whose leave the company. Upon information and belief, Jeffrey T. Stevenson is a fiduciary of the Severance Plan, who exercises discretion and control over the plan. Cole was a participant in the Severance Plan.

20. Fund I to date has generated strong returns for its investors.

21. In 2008, VSS created a private capital fund known as VSS Structured Capital II ("Fund II"), comprised of VSS Structured Capital II, LP (the "Fund II Limited Partnership") and VSS Structured Capital Parallel II, L.P

22. Pursuant to § 2.9 of the Second Amended and Restated Limited Partnership Agreement of VSS Structured Capital II, L.P, dated as of July 31, 2008 (the "Fund II Limited Partnership Agreement") the investment focus of Fund II is to "seek to achieve long-term capital appreciation and current returns through investments primarily in junior securities of domestic and foreign companies engaged in the media, communications, information, education and related industries."

23. VSS Structured Capital II, LLC is the general partner of Fund II (the "Fund II General Partner").

24. VSS Fund Management LLC (the "Manager") is the manager of Fund II and, as such, is entitled to management fees.

25. Pursuant to the Fund II Limited Partnership Agreement §§ 1.6 (e), (f) and (m), the Fund II Limited Partnership and the Fund II General Partner have certain enumerated powers, including but not limited to, the power to: (i) "to hire ... employees of the Partnership as it may deem necessary or advisable, and to authorize each such agent and employee to act for and on behalf of the Partnership;" (ii) "to retain the Manager, as contemplated by Section 7.1, to investment advisory and managerial services to the Partnership ...;" and (iii) "to carry on any other activities necessary for, in connection with, or incidental to any of the foregoing or the Partnership's business."

26. Pursuant to the Fund II Limited Partnership Agreement § 2.1 (a), the General Partner has the right to delegate some of its enumerated powers to the Manager: "The General Partner may exercise on behalf of the Partnership, and subject to Section 7.1, may delegate to the Manager, all of the powers set forth in Section 1.6."

27. Pursuant to Partnership Agreement § 7.1, the Partnership appointed the Manager to act as the manager of the Fund II Limited Partnership, under the General Partner's supervision:

> *Subject to the general supervision of the General Partner, the Manager shall manage the operations of the Partnership*..., provided that the *management and conduct of the activities of that Partnership shall remain the sole responsibility of the General Partner*

and all decision relating to the selection and disposition of the Partnership's investments shall be made exclusively by the General Partner in accordance with this agreement.... Appointment of the Manager by the Partnership shall not relieve the General Partner from its obligations to the Partnership hereunder or under the Act." (emphasis added).

28. In or about 2008, the Manager retained Cole as co-manager of Fund II. Pursuant to the terms of the Fund II operating agreements, if Cole left the company, Cole had no restrictions on his ability to work, to solicit business or to solicit employees. In addition, pursuant to the Severance Plan, Cole was entitled to receive severance upon leaving the Manager in monthly installment until fully paid or until the amount equaled one year's pay.

29. Cole was expressly defined as a "Key Man" under the Partnership Agreement, such that if he and his co-manager, Hal R. Greenberg, were terminated or failed to fulfill their employment obligations, a "Key Man Event" was triggered under the agreement which required the Partnership to provide formal notice of such departure to the Limited Partners and the Investment Advisory Committee, and to take certain enumerated steps to find a replacement.

30. Cole also served on Fund II's investment committee. Pursuant to § 2.9 of the Partnership Agreement: "The General Partner shall appoint an investment committee (the Investment Committee) initially consisting for four members, which shall make all investment decisions related to the Partnership. The initial members of the

Investment Committee shall be John S. Suhler, Jeffrey T. Stevenson, Hal R. Greenberg and George L. Cole."

31. From 2008 to early 2012, Cole received a salary of $750,000. From early 2012 through the date of his termination by his Employer, Cole received a salary of $650,000 per year.

32. Cole has performed all of his obligations.

33. Fund II to date has generated strong returns for its investors.

34. In early 2013, VSS sought to start another fund, to be called VSS Structured Capital III ("Fund III").

35. In addition to having Cole continue to manage Fund I and Fund II, the Manager sought to assign Cole to work as co-manager of Fund III as well. At the same time, Stevenson asked Cole to become a participant in Fund III.

36. To document Stevenson's proposal that Cole become a participant in Fund III, the Manager drafted proposed forms of a limited liability company agreement for Fund III (the proposed "Fund III LLC Agreement") and, in May 2013, circulated the agreement to Cole for his review, approval and signature.

37. Approximately one month before circulating the Fund III LLC agreement, the Manger also delivered to Cole a proposed employment agreement that would change Cole's employment with the Manager.

38. This was the first time the Manager had ever proposed that Cole sign an employment agreement.

39. The proposed written employment agreement did not accurately reflect the terms pursuant to which Cole had been employed during the prior twelve years.

40. The draft agreements included new proposed terms that would materially change the terms of Cole's employment with VSS, including new restrictive covenant terms contained in the draft employment agreement, which sought to severely restrict Cole's activities upon separation from the Manager.

41. On or about June 28, 2013, another executive at VSS (who had also received the draft agreements to become a participant) sought clarification from Jeffrey Stevenson, the Manager's Managing Partner, regarding the new proposed restrictive covenant terms, including how such terms would operate in relation to severance payments. Cole was copied on the inquiry.

42. In response to the executive's questions, in an email dated June 28, 2013, sent to the executive and to Cole, Stevenson acknowledged that the Manager has "a severance policy that we've been operating under for a long time;" that it was "put into place a long time ago," and that the "policy has been good enough for 30 years." Stevenson also stated that pursuant to such policy, the Manager had often "paid severance in excess of the policy." Stevenson promised that "if your employment were terminated by VSS without cause, you would be entitled to severance so that, in effect, VSS would be paying you for complying with your obligations."

43. The policy to which Stevenson was referring is the Manager's established and long-standing pattern and practice of paying one month's severance for each year that

an employee had worked with Manager. Departed employees had routinely received benefits pursuant to this policy.

44. Due to the presence of substantial proposed adverse new provisions that would restrict Cole's rights should he ever leave the firm, Cole refused to sign the new agreements as written.

45. Because Cole refused to accept the terms contained in the proposed agreements – which terms were materially different from any terms Cole had ever been subject to at the firm – on July 1, 2013, Stevenson on behalf of the Employer terminated Cole without cause.

46. On the date of his termination, Cole was entitled to at least $650,000 of severance pursuant to the Manager's long-standing severance policy (the "Severance Payments").

47. After termination, Cole demanded the Severance Payments from the Manager, but the Manager has refused to make the payments.

48. The Manager's denial of severance benefits to plaintiff was and is contrary to its Severance Plan and is in violation of ERISA.

49. Stevenson's refusal to pay to Cole the Severance Payments is a breach of Stevenson's fiduciary duties.

CLAIMS

COUNT ONE
(VIOLATION OF SECTION 502(A)(1)(B) OF ERISA)

50. Plaintiff repeats, realleges, and incorporates by reference each and every allegation previously made herein as if the same were more fully set forth at length herein.

51. Plaintiff's right to severance pay under the Severance Plan constitutes a right governed by and arising under ERISA, as the Plan is an ERISA benefit plan within the meaning of 29 U.S.C. § 1002(1).

52. Defendants' payment of severance to nearly all separated employees consistent with the provisions of the long-term plan, for at least ten years, represents the unbroken continuation of that plan.

53. Because the long-term plan remained in effect but was not adhered to in determining the amount of severance offered to plaintiff, defendants violated ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

54. Accordingly, Plaintiff has been wrongfully deprived of benefits to which he was entitled under the plan.

55. Plaintiff is entitled to benefits under the Severance Plan in the amount of at least $650,000.

COUNT TWO
(BREACH OF CONTRACT)

56. Plaintiff repeats, realleges, and incorporates by reference each and every allegation previously made herein as if the same were more fully set forth at length herein.

57. During the course of plaintiff's employ, including up until June 28, 2013, Manager promised to pay Cole severance if he were terminated without cause.

58. Cole was terminated without cause.

59. As of the date of this Complaint, defendants remain in material breach of contract in respect of plaintiff's Severance Payments, as more fully described herein.

60. Despite verbal and written demands, plaintiff was not paid any portion of the earned Severance Payments duly owed to him.

61. Accordingly, Plaintiff is owed and entitled to receive an amount of at least $650,000 in respect of his Severance Payments.

COUNT THREE
(BREACH OF IMPLIED CONTRACT)

62. Plaintiff repeats, realleges, and incorporates by reference each and every allegation previously made herein as if the same were more fully set forth at length herein.

63. There exists an implied contract to pay the amount otherwise due and owing to plaintiff.

64. An implied contract between plaintiff and defendants for the payment of the Severance Payments arose from the fact that defendants have a long-standing policy, practice and history of paying severance to employees such as plaintiff, and that the non-payment of the severance for an employee who is similarly situated to plaintiff is unprecedented;

65. Other employees similarly situated to plaintiff have consistently received severance while employed with defendants, consistent with this practice;

66. Plaintiff and defendants mutually understood and appreciated the fact that the severance constituted a substantial portion of plaintiff's total compensation package and incentive to remain employed with defendants; and

67. Plaintiff was aware of defendants' severance policy and relied upon it when rendering services to defendants.

68. It was reasonable for plaintiff to expect that he would receive the severance for the work that he performed for defendants and these facts gave rise to an implied-in-fact contract for such compensation.

69. Accordingly, plaintiff is owed and entitled to receive an amount of at least $650,000 in respect of his Severance Payments.

COUNT FOUR
(UNJUST ENRICHMENT/QUANTUM MERUIT)

70. Plaintiff repeats, realleges, and incorporates by reference each and every allegation previously made herein as if the same were more fully set forth at length herein.

71. But for defendants' unilateral bad faith in changing the terms of plaintiff's Severance Payments after-the-fact and by terminating him without cause, plaintiff would have been unconditionally paid the Severance that was promised to him.

72. Plaintiff is entitled, in quantum meruit, to his Severance Payments for the work, labor and services provided during the course of his employment.

73. Based upon the reasonable expectation that plaintiff was to be guaranteed his Severance Payments, plaintiff shall be entitled to a quantum meruit award equal to at least $650,000.

74. Under the doctrine of quantum meruit, one (i.e., defendants) who accepts and benefits from the services of another (i.e., plaintiff) who renders those services with the full expectation of being paid, must be paid for the reasonable value of those services.

75. Plaintiff provided substantial services to defendants during the course of his employment and would have continued to do so, but for defendants' unilateral action.

76. Accordingly, plaintiff is owed and entitled to receive a quantum meruit award of at least $650,000 in respect of his Severance Payments.

COUNT FIVE
(PROMISSORY ESTOPPEL)

77. Plaintiff repeats, realleges, and incorporates by reference each and every allegation previously made herein as if the same were more fully set forth at length herein.

78. Defendants, through their agent, made a clear and unambiguous promise to plaintiff, upon his agreement to remain employed with defendants, that plaintiff would be unconditionally paid his Severance Payments.

79. In reasonable reliance upon the numerous unequivocal and express verbal promises, representations and guarantees made to and relied upon by plaintiff to his detriment by those agents of defendants in authority during the course of plaintiff's employment including the promised Severance Payments, plaintiff continued to remain employed with defendants through the date of his termination.

80. Defendants made certain unequivocal and express verbal promises, representations and guarantees to and relied upon by plaintiff to his detriment.

81. Such reliance by plaintiff was reasonably foreseeable at the time defendants and its agents made these promises.

82. Accordingly, plaintiff reasonably relied to his detriment on the above-mentioned promises and representations made by defendants.

83. Plaintiff has been injured by reason of his reliance on the foregoing representations and promises of defendants, in the amount equal to the value of his Severance Payments of at least $650,000.

84. Accordingly, Plaintiff is owed and entitled to receive an amount of at least $650,000 in respect of his Severance Payments.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor and against the Defendants, jointly and severally, as follows:

(a) On Counts One, Two, Three, Four and Five, awarding damages against Defendants, in an amount to be determined at trial, but reasonably expected to equal or exceed $650,000;

(b) Awarding Plaintiff his costs and expenses, reasonable attorney's fees, and pre-judgment and post-judgment interest incurred as may be allowed by law; and

(c) Such other and further relief as this Court finds just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands trial by a jury on all issues so-triable.

Dated: New York, New York
August 12, 2013

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